# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES – SAN FRANCISCO

### SUN CAB, INC. d/b/a NELLIS CAB COMPANY

Case 28-CA-106245

and

# FIKRESILASSIE WOLDEYES, an Individual

*Larry A. Smith*, Esq., of Las Vegas, Nevada, for the General Counsel.

James T. Winkler, Esq., (Littler Mendelson, P.C.) of Las Vegas, Nevada, for the Respondent.

### **DECISION**

### STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. I heard this case in trial at Las Vegas, Nevada, on November 5–6, 2013. On May 30, 2013<sup>1</sup>, Charging Party Fikresilassie Woldeyes (Woldeyes) filed the charge in Case 28–CA–106245 alleging that Sun Cab, Inc., d/b/a Nellis Cab Company (Respondent or Company) committed violations of Sections 7, 8(a)(1) and (3) of the National Labor Relations Act (here, the Act). Woldeyes filed the first amended charge on July 25, 2013, and a second amended charge on July 29, 2013. On July 31, 2013, the Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Sections 8(a)(1) and (3) of the Act<sup>2</sup>. Respondent filed a timely answer to the complaint on August 8, 2013 denying the allegations.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire

<sup>&</sup>lt;sup>1</sup> All dates are in 2013, unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> The complaint was amended at hearing by adding new paragraphs 5(d) and 5(e) to add further allegations of Act violations, threats, and impressions of surveillance. See Transcript at pages 7–10; General Counsel Exhibit (GC Exh.) 1(j). For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s).

record<sup>3</sup>, from my observation of the demeanor of the witnesses<sup>4</sup> and having considered the posthearing briefs<sup>5</sup> of the parties, I make the following:

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### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation, with an office and place of business in Las Vegas, Nevada, has been engaged in the operation of taxicab services in Las Vegas, Nevada. The parties stipulate and I find that during the twelve months prior to the filing of the charge, Respondent received gross revenues in excess of \$500,000. (Stip. Fact No. 3, Jt. Exh. 1.) The parties further stipulate and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act. (Stip. Fact No. 4, Jt. Exh. 1.) It is also admitted and I further find that the Industrial, Technical, and Professional Employees Union, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act. (Stip. Fact No. 5, Jt. Exh. 1.)

### II. THE ALLEGED UNFAIR LABOR PRACTICES

# A. Background

There has been a prior case involving this Respondent in Las Vegas, Nevada.

On February 4, 2012, the day before Superbowl Sunday, taxi drivers from the 16 different Las Vegas taxicab companies participated in what the drivers called an "extended break" where they removed their cabs from service in protest to the TA consideration of issuing more medallions. Several of Respondent's drivers started their "extended break" by meeting at an Ethiopian restaurant. Approximately 200 cab drivers from the 16 cab companies met at the restaurant and many drove Las Vegas Boulevard afterward, honking horns, and flashing their

³ I hereby correct the transcript as follows: Tr. 9, line 8: "threats than allegations of impressions surveillance" should be "threats and impression of surveillance"; Tr. 107, line 8: "2012" should be "2011"; Tr. 109, line 15: "again is" should be "against"; Tr. 122, line 11: "he won't" should be "we won't"; line 13: "know" should be "want"; line 14: "one attendant" should be "he said"; line 15: "won that election" should be "won't have an election"; line 16: "know" should be "allow"; Tr. 123, line 11: "listings" should be "other things"; Tr. 126, line 13:"I can— " should be "I can—one month—"; Tr. 237, lines 4, 19 and 24: "consent to agree" or "consent agree" should be "consent decree"; Tr. 255, line 25: "everyone them" should be "every one of them"; Tr. 262, line 16: "bought" should be "brought"; Tr. 263, line 20: "affect" should be "effort"; Tr. 270, line 1: "considered" should be "concerted"; Tr. 281, line 4: "on" should be "at."

<sup>&</sup>lt;sup>4</sup> The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and untrustworthy.

<sup>&</sup>lt;sup>5</sup> Documentary evidence is referred to either as "GC Exh." for a General Counsel exhibit, "R. Exh.," for a Respondent exhibit, or "Jt. Exh." for a jointly submitted exhibit from the parties. References to posttrial briefs shall be either "GC Br." or "R. Br." followed by the page numbers. Citations to the record are not meant to be exhaustive or exclusive.

lights while refusing to pick up customers. The "extended break" lasted approximately 2 to 3 hours. (Stip. Fact No. 14, Jt. Exh. 1.)

Respondent suspended 17 Ethiopian drivers for participating in the "extended break" including its cabdriver Dawit Aleme<sup>6</sup> (Aleme). (Stip. Fact No. 15, Jt. Exh. 1.) The events involving the extended break are captured in case JD(SF)–57–12, which was heard on September 25–26, 2012, and for which a decision issued on December 27, 2012 by Administrative Law Judge (ALJ) Jay R. Pollack . (Stip. Fact No. 16, Jt. Exh. 1.) In that case, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act by suspending 17 employees for their participation in a lawful extended break, a protected concerted activity, and Section 8(a)(1) by coercively interrogating employees about their union activities and union sympathies. That case is currently on appeal with the Board.

As indicated above, the Respondent has filed exceptions to Judge Pollack's decision, which remain pending, and thus his findings are not final. Nevertheless, it is appropriate to consider and rely on those findings in deciding the issues in this case. The issues decided by Judge Pollack were fully litigated before him, and relitigating or revisiting those issues de novo in this related proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent results and unnecessary delays. See Wynn Las Vegas, LLC, 358 NLRB No. 81 fn. 1 & JD. at 4-5 (2012) (Board affirmed judge's ruling that the respondent company was precluded from relitigating lawfulness of suspension, an issue fully litigated and decided by another judge in a prior case, even though that decision was pending before the Board on exceptions); Grand Rapids Press of Booth Newspapers, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000) (judge relied on another judge's findings in an earlier case as evidence of animus even though the case was pending before the Board on exceptions); and Detroit Newspapers Agency, 326 NLRB 782 fn. 3 (1998), enf. denied on other grounds 216 F.3d 109 (D.C Cir. 2000) (judge relied on earlier decision of another judge to find that a strike was an unfair labor practice strike, even though the decision was pending before the Board on exceptions).

Respondent is engaged in the business of providing taxicab services in the Las Vegas metropolitan area. It is 1 of 16 cab companies certified to operate in Las Vegas by the Taxi Authority (TA). (Stip. Fact No. 2, Jt. Exh. 1.) The TA regulates the competitive taxicab industry and issues medallions, metal plates affixed to each taxicab, which authorizes the number of cabs to be operated within a certain jurisdiction. Respondent has approximately 163 medallions of various types. (Stip. Fact No. 12, Jt. Exh. 1.)

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<sup>&</sup>lt;sup>6</sup> Aleme is also known as Dawit Alemu or Dait Alemu in related ULP cases including ALJ Pollack's decision.
<sup>7</sup> Some types of medallions allow unrestricted use, and others restrict the use of cabs by time or geographic location. For example, some cabs may only be authorized to operate during certain hours, or to pick up passengers in particular regions.

In early 2012, the TA was considering whether to issue more medallions. Authorizing the additional Las Vegas taxicabs would increase competition and the present number of available cabs on the road. In response, taxicab drivers from all 16 companies participated in a concerted extended break where they removed their cabs from service and met at an Ethiopian restaurant. The extended break took place on February 4, 2012, the day before Super Bowl Sunday, and lasted approximately 2 to 3 hours. Respondent wrongfully suspended 17 of its Ethiopian drivers for participating in the extended break. See JD(SF)–57–12 at 7.

On or about February 16, 2012, Respondent learned that the Union was trying to organize Respondent's cab drivers when it received a letter from the Union dated February 16, 2012, stating that the Union was engaged in a union-organizing campaign among its taxi drivers. (Stip. Fact No. 16, Jt. Exh. 1.)

After Respondent learned of the Union's organizing campaign in February of 2012, Respondent promoted driver Walleligne Wolde (Wolde) to a road supervisor. Road supervisors respond to driver accidents and interact with the public, insurance adjusters, police, the TA, and supervisors of other companies on behalf of Respondent. (Stip. Fact No. 9, Jt. Exh. 1.)

Approximately 30 percent of Respondent's taxi drivers are Ethiopian. As the only Ethiopian supervisor who spoke the language of the Habesha<sup>8</sup> people, Wolde was responsible for communicating with the Habesha people in their language. He was issued a company cell phone to conduct Respondent's business as a road supervisor.

Also in February 2012, the TA held a meeting regarding the consideration of additional medallions. The meeting was recessed several times due to crowd reactions. Jaime Pino<sup>9</sup> (Pino), the Director of Operations for Respondent, was present at the meeting and spoke in favor of additional medallions. (Stip. Fact No. 17, Jt. Exh. 1.) Pino is the highest ranking manager of the Respondent under the owner, and Pino has authority along with Respondent's owner Ray Chenoweth (Chenoweth) to hire, fire, and discipline all of Respondent's employees. (Stip. Facts Nos. 6 and 7, Jt. Exh. 1.)

At all material times, Osmel Alonso (Alonso), Rodney Lugo (Lugo), and Larry Proctor (Proctor) have been supervisors at Respondent. As supervisors, they, among other things, have some authority to issue discipline to Respondent's drivers. (Stip. Fact No. 8, Jt. Exh. 1.) At all material times, Chenoweth, Pino, Alonso, Lugo and Proctor have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (Stip. Fact No. 10, Jt. Exh. 1.) While Respondents'

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<sup>&</sup>lt;sup>8</sup> Habesha or Ethiopian refers to people from roughly the same region of East Africa. The terms are used interchangeably in this decision and mean the same thing. Amharic is the dialect or national language of Ethiopia spoken by the Ethiopian cab drivers in this case. Tr. 80.

<sup>&</sup>lt;sup>9</sup> Pino is also known as Pinto in ALJ Pollack's decision.

supervisors have some discretion to discipline employees, only Chenoweth and Pino have the authority to hire and fire (terminate) Respondents' employees. (Stip. Fact Nos. 6–8, Jt. Exh. 1.)

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Las Vegas taxi activities increased in 2013. From approximately March 3, through May 2, the Union was on strike with one of Respondent's competitors, Yellow Checker Star, over a successor contract. (Stip. Fact No. 18, Jt. Exh. 1.) At approximately the same time anywhere from dozens to hundreds of drivers engaged in a wildcat strike at another local cab management company, Frias Transportation. (Stip. Fact No. 19, Jt. Exh. 1.)

On or about March 22, the Union filed a petition in case 28–RC–100893 to represent Respondent's taxi drivers. (Stip. Fact No. 20, Jt. Exh. 1.)

On April 20, an election was held at Respondent to determine whether the petitioned-for unit wished to be represented by the Union. A Tally of Ballots was completed with 125 votes cast for the Union and 227 votes cast against the Union. (Stip. Fact No. 21, Jt. Exh. 1.) On April 30, a Certification of Results showed that a majority of the votes had not been cast for the Union and that the Union had lost the election. (Stip. Fact No. 22, Jt. Exh. 1.)

# B. Respondent's Taxi Drivers and Respondent's Policies

Respondent requires its cab drivers to work various 12-hour shifts which do not include a mandatory 1-hour lunchbreak 4 or 5 days each week. The best shift to work is the noon to midnight shift because it is the busiest and allows the driver and the Company to earn the most money. When a driver gets a cab, he or she receives a trip sheet from the supervisor that has basic information about the cab and driver. The drivers must provide information on the trip sheet that includes the start and stop time of their shift, the fare for each ride, and miscellaneous other information for total mileage, fees, and fares. Accurate trip sheets are required by law, and the information within them determines the driver's productivity.

The assignment of shifts is based on a driver's productivity. A driver must have good productivity to earn a shift, and have the highest productivity to be assigned the best noon to midnight shift. Extra Board drivers are temporary fill-in or extra on-call drivers, and they are used when there are open shifts or when regular drivers go on vacation, are sick, or must miss their shift. Drivers with higher productivity are assigned the better shifts. Drivers who fail to maintain productivity for their shift, risk losing the shift, risk assignment to a less desirable shift, and, eventually, risk termination. Before the charge in this case, Respondent practiced a progressive discipline policy with its drivers.

Respondent's written work policy states that it exercises complete discretion in disciplining its taxicab drivers. Respondent uses an Employee Handbook which provides that all policies and procedures are:

[S]ubject to change at any time at the discretion of management. When the information included in our handbook does change, every effort will be made to keep you informed through suitable methods of communication, including postings on the company bulletin boards and/or notices sent directly to you. This employee handbook may only be amended or modified in writing by the General Manager or the Director of Operations.

The Handbook specifies that certain types of conduct, such as repeated no call/no shows, typically result in immediate termination, but allows discretion to issue "less severe forms of discipline, such as verbal warnings, written warnings, probation, and suspension" and "will only take the steps it considers to be most appropriate in consideration of the issues it is attempting to resolve" for matters including "[e]xcessive absenteeism and/or tardiness" and "[o]ver-charging customers and long-routing or long-hauling <sup>10</sup>[.]"

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Respondent professes to utilize a discretionary progressive disciplinary system, yet there is no set number of absences, falsification of timesheets, or other bad acts, that require discipline or termination. For example, supervisors have exercised discretion and do not always require doctor notes for driver absences. In addition, Respondent has complete discretion in deciding whether to terminate a driver based on a varied number of absences. Respondent's policy is to require drivers to get a doctor's note when calling in sick to miss a shift, but supervisors have been lax and frequently ignore enforcing this policy and requiring such doctor notes. Consequently, as discussed below, I find that on application, Respondent's "discretionary progressive disciplinary system" is unreliable and in name only as Respondent's discipline of its cab drivers is arbitrarily applied by Chenoweth or, most times, by Pino, who, as stated above, is the only Respondent supervisor (with Chenoweth) with authority to hire or fire employees and it is my observation from hearing testimony from all witnesses at hearing that Pino runs Respondent with an iron fist and dictates where and when employees work and has actual final say whether they will be disciplined.

### Fikresilassie Woldeyes

Woldeyes started working for Respondent as a taxi driver in August 2011. Woldeyes performed well and, based on his high productivity of 104 percent above average, he quickly earned the most desired shift of noon to midnight at Respondent, Thursdays through Mondays,

<sup>&</sup>lt;sup>10</sup> The competitive nature of the industry has caused drivers to take customers on longer routes and overcharge customers in order to make more money for themselves and their employer, although this practice is prohibited by the Nevada Revised Statutes and Nevada Administrative Code. Respondent's practice in March/April 2013, was to require its drivers to long-haul as much as possible using tunnels to earn the increased fees. Woldeyes did not like being required by Respondent to long-haul as much as possible and he believably recounted that Respondent normally would not discipline its drivers for long-hauling. Pino convincingly testified that he and Respondent do not really enforce the Handbook rule against long-hauling as long as customers consent to being taken on the longer route as both Respondent and drivers make more in fees from consensual long-hauling. When told that longer routes are quicker, a statement that most times is true, the driver does not also state that the fare will cost more due to the longer distance driven. Thus, Respondent's customers are routinely misled to think faster is less expensive when faster but longer distance routes are usually more expensive.

or 60 hours per week. Woldeyes remained at or near the top of his shift for productivity, and he stayed on this coveted shift throughout his employment.

Woldeyes explained that using the deceptive technique of long-hauling where a customer unknowingly consents to a quicker, longer but more expensive route to their destination is the reason he was so productive. He convincingly opined that at Respondent, it is like a competition between the cabdrivers as whoever can do the most long-hauling gets rewarded by Respondent with the best shifts, the best cars, and the best days off. Respondent's drivers were at the only cab company that required the use of code over the radio as a means to determine whether there was "construction" or "no construction" on the route being driven to falsely justify taking the longer more expensive route to a customer's destination depending on whether the TA or Las Vegas police were at a destination trying to prove cab drivers' long-hauling.

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Before May 27, Woldeyes was never suspended, transferred to another shift, disciplined, or counseled for low productivity or leaving work early or having too many absences. Woldeyes initially did not support the Union and did not consider becoming a member. Respondent was aware of these views because Woldeyes openly expressed them to Respondent's management team, Pino, Respondent's owner, and to Walleligne Wolde (Wolde), his former colleague and subsequent road supervisor and agent to Respondent's management, as a prerequisite to Woldeyes first joining the Company. Woldeyes was still opposed to unions in February 2012, during the time that the extended break took place and when the Union first started organizing Respondent's drivers. Woldeyes did not take part in the extended break at that time with the 17 Ethiopian drivers at Respondent. Woldeyes also was not listed as an organizer in the letter received by Respondent also in February 2012, informing Respondent that the Union was trying to organize its cab drivers and listing 10 Ethiopian driver organizers.

Around February or March 2013, Woldeyes' opinion changed to support the Union. He began participating almost daily in Habesha teleconferences, <sup>11</sup> for several hours each day, in support of unionizing. Respondent, through Pino and others, knew that a large majority of Ethiopian drivers were united in support for a union. Woldeyes would listen during some portions, and at other times, would actively speak during the teleconferences to promote the Union. Woldeyes stated that it was better to be in a union, and discussed how it could reduce working hours from 12-hour shifts to 10-hours shifts, 4 or 5 days a week with 2 or 3 days off, improve benefits, prevent forced long-hauling, allow shifts earned by seniority, and provide transparency in pay so that drivers could know how their commissions are computed. He also discussed how it was wrong that Respondent told them that the Union was not good. I find that Woldeyes' change in position to actively speak out and support unions and unionization with fellow drivers and over the radio during Habesha teleconferences is protected concerted activity (protected activity).

<sup>&</sup>lt;sup>11</sup> Social interaction forums where a large number of Ethiopians, averaging 400 each day, would dial in through a conferencing service to address and discuss issues affecting their community including unionization.

In March and April of 2013, Respondent became aware of Woldeyes' changed position. During a Habesha teleconference where Woldeyes was advocating for the Union, the conference moderator observed that Respondent, through a conference screen displaying the phone numbers and names of conference participants, called in to listen to the conference. The moderator took a picture showing caller name "Nellis Cab Co [Respondent]" and Respondent's phone number on the conference screen, and sent the picture to Woldeyes. Road Supervisor Wolde, for Respondent, had called in to listen to the teleconference and listened as Woldeyes spoke in favor of unionization.

Soon after Woldeyes finished his speech advocating for the Union, Road Supervisor Wolde called him and said, "That's a great speech... I don't know that you are [a] unionizing guy. I thought you were a non-unionizing guy. [W]hat's going on[?]" Woldeyes responded that he was not [a non-unionizing guy] anymore. Since approximately February 2012, Wolde has been Respondent's supervisor and dispatcher who used Respondent-owned cell phones with its Ethiopian drivers to direct them and communicate with them and Respondent and, like Woldeyes, and approximately 26 percent of Respondent's drivers, Wolde is Ethiopian and Respondent's only supervisor who speaks Amharic. Wolde alone communicates with the Ethiopian drivers and relays his communications to Respondent as part of his job duties. Wolde admitted that while he has listened to the Habesha teleconferences in the past, he does not participate or voice his own opinion in the discussions.

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Woldeyes also spoke with Operations Manager Pino in support of the Union on two occasions. During the first conversation in March of 2013, Pino approached a group of drivers waiting for their shift to start and said, "those groups from certain countries, they are trying to unionize everywhere, even here. And that's not a good idea." Woldeyes then asked him, "What is the problem if we go union?" Pino replied, "If you go union, you'll get less money. You will – you will then the rates go low." Woldeyes responded, "No...I'm not asking you as a driver. I'm asking you as a manager what problem [the Union] will bring to your company []." Pino replied, "You don't get the hour, the shift you like. You don't drive those nice cars." When Woldeyes again tried to clarify that he was asking what would happen to Respondent, rather than the drivers, Pino simply looked at him and left.

About a week later and 2 weeks prior to the election, Woldeyes and Pino had a second conversation about the Union. A pamphlet had been sent by the TA about long-hauling not being tolerated. Woldeyes asked Pino, "What is this [pamphlet] all about?" Pointing towards the paper, Pino said, "It's you unionizing that, printing that. It's you. You unionizing guys who go out bring you this to the companies."

During an Ethiopian Easter holiday<sup>12</sup>, Woldeyes requested a Sunday off to spend time with his family. Respondent denied the request. In previous years, Woldeyes had been granted the request without any problems. Woldeyes then found a driver who was willing to switch

<sup>&</sup>lt;sup>12</sup> Ethiopian Easter was not on the same date as Christian Easter in 2013.

shifts with him, but Respondent still denied Woldeyes' request for the day off despite having a replacement. Around the end of March, early April, Woldeyes requested days off because his wife was hospitalized and having surgery. (GC Exh. 14.) Woldeyes provided doctor notes for these days. On April 11, Woldeyes also asked for time off from April 18 to April 22, due to exhaustion. (GC Exh. 11(a).) Respondent initially denied the request for 5-days off, but gave Woldeyes time off the following week due to Woldeyes' exhaustion. During this time, Woldeyes and his family went to Southern California.

# C. The May 23, 2013 Incident

On Thursday, May 23, Woldeyes called in sick for having a toothache. Woldeyes called at 8:30 a.m. and called back at 9:30 or 10 and told Supervisor Proctor that he was sick. Proctor asked if he was going to go to a hospital or clinic. Woldeyes told him, "Yeah" as he thought the tooth pain would require medical treatment and intended to go to the hospital. Proctor then told Woldeyes, "okay, be well" and "we will work with this." Proctor made no mention about insufficient Extra Board drivers or too many drivers requesting time off or requiring documentation from Woldeyes for the absence. As the day wore on, instead of going to the hospital or dentist, Woldeyes went to the local CVS drugstore and purchased over-the-counter pain medication for his toothache.

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Woldeyes arrived for work the next day, May 24. Supervisor Alonso allowed him to work the shift without providing a doctor's note, but told him to bring a doctor's note on Saturday, the next day.

Woldeyes then reported to work on May 25, but was not allowed to work after another supervisor, Rodney Lugo (Lugo), asked if he brought a doctor's note. Lugo also told Woldeyes that he did not want to receive any note from a chiropractor. Woldeyes had not even mentioned going to a chiropractor and Woldeyes convincingly mentioned that he did not even understand the meaning of the word "chiropractor" and had not mentioned anything about missing work due to a bad back. When Woldeyes told Lugo that he could not get a doctor's note because he treated himself with over-the-counter medicine for his toothache instead of seeing a doctor, Lugo told him that he had to see Pino. Because Pino was not working that day, Woldeyes was sent home.

On Sunday, May 26th, Lugo again told Woldeyes that he could not work and Pino was not at work. On Memorial Day, Monday, May 27th, Woldeyes went to the office to see Pino. However, Pino denied seeing him on the basis that Woldeyes did not have a medical note. Woldeyes was then sent to see Supervisor Alonso. Alonso asserted that Woldeyes had lied about being sick and had instead gone to Los Angeles- an assertion denied by Woldeyes. Alonso told Woldeyes to call later. Pino fired Woldeyes on May 27 and when Woldeyes called later that day, Alonso told him that he was fired. Respondent asserted that Woldeyes was fired for lying to supervisors, failing to present a doctor's note, no call no show, and for unauthorized days off.

At the time Woldeyes was fired, he was still viewed as a productive driver and valuable employee. Other productive drivers have been moved to other shifts for a variety of reasons including attendance, but Woldeyes was not given that opportunity. Two Respondent supervisors, Alonso and Lugo, expected that Woldeyes would be simply demoted, if any discipline at all was to be issued, for Woldeyes' missing work on May 23 without a doctor's note. Supervisor Alonso further testified that there was still value in keeping Woldeyes on one of the other shifts, and that there was no documentation, such as any discipline or warning given to Woldeyes that he was going to lose his shift with any further absences. Supervisor Lugo also testified that Woldeyes was a "high booker" and still of value if kept with the Company and moved to a less productive shift.

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Some drivers, such as Aleme, were removed from the noon to midnight shift and demoted to another shift for having low productivity. On several occasions, drivers would stay working for the company despite falsifying trip sheets. Other drivers had many unexcused absences prior to being terminated, if at all. For example, driver Hayk Garibyan was terminated for seven no call/no shows, and had 20 nonexcused absences and 15 excused absences from April 27, 2012 to April 20, 2013. (Tr. 66:8–25, 67:1–24; GCX 50(a), (b)) Michael Parungao is currently employed as a taxi driver although he has 80 recorded nonexcused absences and 74 excused absences from April 1, 2008 to November 4, 2013. (Tr. 68:8–25, 69:1–22; GCX 51) Shannon Jones was terminated for poor attendance after she accumulated 39 nonexcused absences and 42 excused absences during a 7-month period from September 5, 2012 to April 20, 2013. (Tr. 70:6–25, 71:1–17; GCX 52(a), (b)) She had never provided a doctor's note for her absences. (Tr. 71:15–17) Probationary employee Alicia Casas was terminated for several days of no call/no show having been off for 12 days and having a booking average of -30 percent. (Tr. 73:14–25, 74:1–7; GCX 54(a), (b)) She only worked from January 31 to March 24 and did not pass probation. (GCX 54(a), (b)) Patricia Neely was terminated for poor attendance for 29 absences from January 6 to April 29 and had accrued a total of 72 nonexcused absences and 3 excused absences in 10 months from June 26, 2012 to April 29, 2013. (Tr. 75:3–25, 76:1–13; GCX 55(a)-(c)) In comparison, Woldeyes had comparably fewer absences, even if he had accumulated 25 unexcused absences and 16 early outs as claimed by Respondent while maintaining high productivity. (GCX 22(a)-(m), 56) The disparity in Woldeyes' treatment is even clearer considering the incorrect unexcused absences since he started favoring the Union as previously described.

### **ANALYSIS**

### I. Credibility

It is also important to address the credibility of Charging Party Woldeyes. Woldeyes spoke in broken English without an interpreter though English was not his first language. Some observations: Woldeyes spoke and responded confidently and without hesitation on most questions, spoke directly to the person questioning him and responded in broken English in a calm manner. Often he attempted to rephrase his answer a second way to clarify and

compensate for his broken English and less than perfect grammar. He appeared truthful and genuine. I find that he did not lie to Respondent's supervisors about his May 23 absence and that when he first spoke to Proctor he had a good faith belief that he would go to a hospital or dentist for treatment for his toothache and, as the day progressed, he simply treated it with pain medication from a CVS pharmacy. His testimony was consistent with other nonmanagement employees of Respondent as well as portions of the testimony from Respondents' supervisors. Simply stated, he knew what he was testifying about and expressed himself in a fair and candid manner. Woldeyes was especially believable as he explained Respondent's required long-hauling work leading to higher fees and the use of a secret code on the 2-way radios where drivers determine whether it is safe to long-haul and, if so, that drivers were required to do so.

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Woldeyes was also very believable as to Respondent's antiunion statements before his termination, that he did not like being required to long-haul and "lie," and that he actually missed work on May 23 due to a toothache that he treated with over-the-counter pain medication rather than going to see a doctor or dentist as he first thought. He was understandably stunned that he was not demoted rather than be terminated for his May 23 unexcused absence for a toothache given his high productivity/best shift and lack of prior discipline or written warnings beforehand. Woldeyes was persuasive in demeanor as supported by documentary evidence that he took his long-neglected family to Los Angeles, Disneyland and San Diego when he was finally allowed by Respondent to take a week off from work at the end of April and that he did not lie about his May 23 absence and he did not tell Alonso he was in Los Angeles or Minnesota on that date instead of missing work due to his toothache.

Aleme was a current employee who testified at hearing under subpoena. I also find that Aleme's testimony was very credible about his prior demotion to a less favorable shift without termination for being a low booker, his testimony about Woldeyes' changed position before the April election in favor of the Union and Woldeyes' reasons why the Union would help other cab drivers. This is so not only because Aleme testified in a confident manner but because Aleme also testified against his own interests as he remained employed at Respondent at the time of trial and must continue to face Respondent's management after trial. See *S.E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by Respondent.).

I also reject Road Supervisor Wolde's denial of ever having a conversation with owner Chenoweth about a Union as this blanket denial is outweighed by Woldeyes' more detailed recollection of what Wolde actually told him which is also consistent with Respondent's message, through Alonso, to Aleme. In addition, Road Supervisor Wolde did not deny having his telephone conversation with Woldeyes soon after Wolde called in and overheard Woldeyes' change to union support in the radio teleconference nor did Wolde deny having the pub room conversation with Woldeyes. I draw an adverse inference from the fact that Wolde, as agent for Respondent's management, did not address these statements through testimony to potentially corroborate Respondent's alleged version of the facts. *See Douglas Aircraft Co.*,

308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge").

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I found both Pino and Alonso to be unreliable witnesses to the extent their testimony is contradicted by other witnesses and other evidence. Pino attended the entire hearing and had the benefit of listening to other witnesses' testimony prior to portions of his own testimony. Alonso's conclusory testimony that Woldeyes lied about his May 23 absence and had shown him a plane ticket on his smartphone to/from Minnesota or Los Angeles is not credible given Woldeyes' more convincing testimony and the fact that Woldeyes had taken so little extended time off and he had been to Los Angeles with his family just a month earlier on a family outing. In addition, Woldeyes did not have any relatives there to visit on May 23.

Supervisors Alonso and Lugo, and driver Aleme were very convincing that they expected Respondent to simply use its progressive discipline rules, if anything, which was its custom and practice to ignore absences of high producers like Woldeyes or only demote Woldeyes to a less favorable shift rather than terminate him for the unexcused absence on May 23, 2013. Alonso was also credible that only Pino made discipline decisions over all of the other supervisors as to whether a driver would be disciplined and demoted to another shift (as he expected for Woldeyes after his May 23 absence) or would be terminated (as Pino decided for Woldeyes).

Pino was not believable when he testified that he did not know whether Woldeves was for or against the Union from March through May as it is reasonable to believe that Pino shared Chenowith's belief that being against the Union was an important prerequisite to the initial hiring of Woldeyes. Pino's strong dislike for the Union was obvious to all and as Respondent's chief operating officer and manager in charge most of the time at Respondent for all personnel matters including discipline, Pino knew through his own conversations with Woldeyes in March and early April and from Wolde or other supervisors that Woldeves had changed his nonunion position and became a union spokesperson by March 2013. I reject as untrue Pino's testimony with Alonso that the decision to terminate Woldeves was made on May 27, as I find the decision was made beforehand when Respondent' supervisors all demanded Woldeves bring in a doctor's note before he could drive again as this had never been the requirement for high producer Woldeyes before he supported the Union. Pino's personality was especially volatile as evidenced at hearing where I had to admonish him not to make any further vocal outbursts while other witnesses were testifying. (Tr. 123–124, 211.) Finally, Pino was impeached when he initially testified that he had simply encouraged employees to vote in the union election when, in fact, he later admitted on cross-examination that he had actually encouraged the same employees to vote "No." (Tr. 250, 278.)

Respondent argues that "General Counsel has presented no evidence of any other employee lying to a supervisor and remaining employed by Respondent." (R. Br. at 12.) This is not true as referenced above there are a number of instances of falsified trip records, unexcused

(no medical documentation) employee absences, and numerous excused absences related to employees who were not disciplined or terminated by Respondent. I reject as immaterial Respondent's argument that lying in person is significantly worse for Respondent's employees than lying on paper by falsifying trip reports. While together Respondent's custom and practice and its Handbook voice and follow a predictable progressive discipline policy that Woldeyes, his supervisors and Aleme all expected for Woldeyes, the inconsistency and variance of treatment of employees for numerous absences (excused and nonexcused) and falsifying trip records leads to the conclusion that Respondent's discipline practices are completely arbitrary and left to the sole discretion and whim of Pino with uncertain predictability. Respondent's absentee owner authorized Pino to dictate all disciplinary matters.

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In sum, based on my findings above, below I discuss that I find that the fact that Woldeyes did not have a doctor's note for his May 23 absence is insignificant as he did not need one in the past to continue driving and it only determined whether his absence was excused or nonexcused and he and other drivers at Respondent frequently have more than one type of these absences without ever being disciplined before his May termination. The evidence in this case shows that at Respondent it does not matter how many or what kind of absences a driver has. It is most important to Respondent that its cabdriver employees silently work their 12-hour shifts and make as much money for Respondent as possible including as much longhauling as Respondent can obtain. No evidence was presented that any of Respondent's drivers were disciplined for long-hauling. Basically, Woldeyes worked hard for 2 years at Respondent without Woldeyes actively supporting any union, took very little time off of more than 2 or 3 days, received no paid sick days, no pension, and got exhausted from working the long hours away from his family. Things changed by March 2013, when Woldeves decided to support the Union in hope of bettering his work conditions and Respondent became aware of Woldeyes' change to a prounion position. Many drivers at Respondent have numerous absences from work and Respondent has its stable of "on-call" or Extra Board drivers that get called to fill in at the last minute when drivers frequently call in their absences. Respondent only loses its best drivers if someone calls in sick - those who excel at long-hauling and making the most money for Respondent. Respondent had no complaints about Woldeyes' absences until after February 2013, when he changed his position about supporting the Union and his changed position became known to Respondent. This combined with Pino's growing expressed resentment of the Union's activities and the April election led to Woldeyes' termination rather than Woldeyes' demotion to a lesser shift that even his supervisors expected if any progressive discipline was issued given Respondent's handbook rules and past practices.

# II. Since February 2012, Road Supervisor Wolde Was Respondent's Supervisor and Agent Under the Act.

Section 2(13) of the Act creates the test for whether an employee is an agent of the employer:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

An employer can be held liable for the acts of its agents even if the alleged agent is not a supervisor within the meaning of the Act. E.g., *Solvay Iron Works, Inc.*, 341 NLRB 208, 210 (2004). Employers are responsible for the actions of their agents according to common law agency principles. *In re D&F Indus, Inc.*, 339 NLRB 618, 619 (2003). "If the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct." Id. Apparent authority is found when employer manifests to a third party "a reasonable basis for the latter to believe that the [employer] has authorized the alleged agent to perform the acts in question." Id. (quoting *Cooper Industries*, 328 NLRB 145 (1999)). The test is "whether, under all the circumstances, the employee would reasonably believe that the alleged agent 'was reflecting company policy and speaking and acting for management." Id. "The burden of proving an agency relationship exists is on the party asserting its existence." *In re Cornell Forge Co.*, 339 NLRB 733, 733 (2003). Furthermore, "[t]he agency must be established with regard to the specific conduct that is alleged to be unlawful." Id.

"The Board considers the position of the employee in addition to the context in which the behavior occurred" to determine whether the alleged agent had the apparent authority to make the act in question. *Pessoa Construction Co.*, 356 NLRB No. 157 at 3 (2011) (quoting *Pan -Oston*, 336 NLRB 305 (2001)). Here, the alleged conduct occurred when Wolde was acting as a road supervisor and he acted as a road supervisor at all times since February 2012. As stated above, road supervisors respond to driver accidents and are authorized to represent Respondent in interactions with the public, insurance adjusters, police, the TA, and supervisors of other companies on behalf of Respondent. (Stip. Fact No. 9, Jt. Exh. 1.) Road supervisors are also not eligible to vote in union elections for Respondent. (Stip. Fact No. 21, Jt. Exh. 1.)

Wolde was the road supervisor following Respondent's observance of Woldeyes' participation in the Habesha teleconference, during which Woldeyes actively advocated for unionization and Road Supervisor Wolde called Woldeyes. Wolde admitted that at least since approximately November 2012, he is the only supervisor at Respondent who speaks Amharic or one of the other Ethiopian dialects and because of that it is part of his job duties as road supervisor to talk to the Ethiopian drivers for Respondent and relay his conversations with Ethiopian drivers to Respondent. Under these circumstances, despite their earlier friendship, I find that since at least November 2012, Woldeyes could reasonably perceive that Wolde was a supervisor and agent of management. Wolde communicated Respondent's positions to the Ethiopian drivers and he also communicated the Ethiopian drivers' statements to him to Respondent. As such, Wolde acted as a conduit or interpreter between the Ethiopian drivers and management—Pino and Chenoweth, for personnel issues See *Seafood Wholesalers*, *Ltd.*, 354

NLRB No. 53 (2009)(Molina, as management's interpreter, eas Employer's agent); *Poly-America, Inc.*, 328 NLRB 667 (1999).

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I find that Wolde was Respondent's supervisor and agent for many purposes, including when he allegedly spoke and questioned Woldeyes about Woldeyes' alliances in support or against the Union immediately following his speech on the radio as well as Wolde's communicating Woldeyes' change to becoming a union supporter to Respondent and Pino soon after the radio speech.

### III. Allegations of Interrogation and Threats

The General Counsel alleges in paragraphs 5(b), 7, and 9 of the complaint that, on a date between March 17 and March 29, Respondent, by Wolde, interrogated its employees about their union membership, activities, and support in violation of Section 8(a)(1) of the Act.

Following Respondent's observance of Woldeyes' participation in the Habesha teleconference through Wolde's silent listening in, during which Woldeyes actively advocated for unionization, Road Supervisor Wolde called Woldeyes. After asking Woldeyes "What's going on[?]" and speaking with him briefly, the two of them decided to continue their conversation at a local pub after Woldeyes' shift. During this conversation, Wolde told Woldeyes, "I remember when you come to this Company that you say you are against the Union." He then asked Woldeyes, "What happened now? Why you want to bring the union?" After Woldeves shared his reasons, Wolde said to him, "Let me tell you this. Even in the first place, you don't succeed from bring union to [Respondent]. Even if you succeed, that you ask the all of Company, [we won't] have vote." He also stated, "Again, let me tell you one thing. Everyone, who is participating in this movement to bring this union to Nellis Cab Company [Respondent] has consequences. Everybody one by one will be fired . . . I promise you. You will see. You better stop this." Wolde continued to tell Woldeyes that "[once] you are fired from this company for sympathizing [with] the Union, you don't get another place in other companies. You don't get a job at Desert [Cab Company]. You don't get a job at Lucky [Cab Company]. You better stop for your own [good]." (Tr. 121–123.)

In *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board ruled that the appropriate means to decide whether the questioning of an employee amounted to unlawful interrogation was to consider the totality of the circumstances of each situation. As guiding principles for the analysis, the Board suggested—though did not mandate—the application of the factors used in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). *Rossmore House* at 1178 fn. 20. These factors include (1) the background of the employer, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the reply. *Bourne* at 48. While these factors provide insightful assistance, they "are not to be mechanically applied in each case." Instead, the Board has found that the task is ultimately "to determine whether under all the circumstances the questioning at

issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000). The *Rossmore House* test is an objective one and does not rely on the subjective aspect of whether the employee was in fact intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

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Upon considering the totality of the circumstances, including the *Bourne* factors, I conclude that Respondent, through Road Supervisor Wolde, unlawfully interrogated Woldeves in violation of Section 8(a)(1) of the Act. The evidence shows that at the time of the conversation, Respondent had become the focus of much union activity, and as a result, was attempting to avoid the Union. In advocating openly for the Union in a teleconference. Woldeyes participated in a protected activity. Wolde directly asked Woldeyes to reveal his view of the Union and his changed position supporting it. Wolde, moreover, offered no justification for his questioning or assurances of blackballing. See Norton Audubon Hospital, 338 NLRB 320, 321 fn. 6 (2002). Although Woldeyes once may have viewed Road Supervisor Wolde as a friend before he was promoted to a low-level road supervisor in or before November 2012. Wolde was Woldeves' direct supervisor when driving as Wolde was consulted whether long-hauling should occur and gave Company cellphone directions to Woldeyes, reasonably tending to make the questioning that much more threatening. See, e.g., Station Casinos, LLC, 358 NLRB No. 153, slip op. at 2–3, 50 (2012). This relationship paired with the unusual meeting place first over Company cellphones and later at a pub where Woldeyes was isolated and alone with Wolde, the private nature of the conversation, and the fact that the conversation began with Wolde's unexplained knowledge of Woldeye's changed alliance toward the Union, created an inherently coercive atmosphere. In addition, I find that Wolde's comments that "[once] you are fired from this company for sympathizing [with] the Union, you don't get another place in other companies. You don't get a job at Desert [Cab Company]. You don't get a job at Lucky [Cab Company]. You better stop for your own [good]" would have exacerbated the already coercive nature of his inquiry into Thames' change of position for the Union. Last, Wolde's questions pertaining to Woldeyes' alliances in support or against the Union immediately following his speech, paired with Respondent's history of hostility towards union supporters (as demonstrated by its suspension of 17 drivers in a protected strike) were coercive and thus unlawful.

# IV. Wolde's Threats of Discharge and Blacklisting

The General Counsel further alleges in paragraphs 5(c), 7, and 9 of the complaint that, on a date between March 17 and March 29, Respondent, by Wolde, by telling its employees that anyone who supported the Union would face the consequences, one by one, and everyone would be fired, threatened its employees with discharge if they supported the Union as the employees' bargaining representative, and by telling its employees that when someone got fired from one of the cab companies because of their union activities, they would not get hired at another cab company, threatened its employees with blacklisting with regard to future firing of

the employees supported the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages, or other working conditions if they support the union. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (2010). In addition, the Board has found that "be careful" warnings to an employee convey the threatening message that union activities would place an employee in jeopardy. *Gaetano & Associates Inc.*, 344 NLRB 531, 534 (2005) (finding that telling an employee to "be careful" was an unlawful threat). *See also*, e.g., *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) ("be careful" statement by supervisor in context of union activity held unlawful); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's statements such as "watch out" are unlawful implied threats).

Further, the Board in *Hall Construction*<sup>13</sup> adopted a finding of an unlawful threat of blacklisting where employees were told that unionizing would mean "all of us guys would be blackballed from any work in the [the respective employers' field]...." *Flamingo Hilton-Laughlin*, 324 NLRB 72, 116 (1997). Here, Road Supervisor and Respondent agent Wolde gave Woldeyes a warning that he better stop his participation in support of union activities with a clear threat of termination for everyone who participates in such activities. He stated that participating in the union movement would have consequences, and promised that everyone will be fired "one by one." These statements are unlawful for the same reasons that the "be careful" warnings were unlawful in *Gaetano & Associates*. Woldeyes was also explicitly told that if he were to be terminated for sympathizing with the Union, other cab companies in the Las Vegas area, such as Lucky Cab and Desert Cab would not hire him. I further find that these blacklisting threats made by Respondent violated Section 8(a)(1) of the Act.

# V. Wolde's and Alonso's Statements of Futility

The General Counsel further alleges in paragraphs 5(a), 5(c), 7, 8, and 9 of the complaint that, on a date on or between about March 17 and March 29, Respondent, by Wolde, and on or about March 22, Respondent, by Alonso, by telling employees that Chenoweth had told Wolde that even if the Union wins at Respondent they will never have a chance to come to Respondent, informed its employees that it would be futile for employees to select the Union as their bargaining representative, and by telling employees that the Union was not going to do anything, that it would not help the employees, and that Respondent was better without the Union, Respondent was in violation of Section 8(a)(1) of the Act.

Statements that selecting union representation would be futile violate the Act. *See*, e.g., *Federal Logistics & Operations*, 340 NLRB 255, 266–267 (2003); Goya Foods, 347 NLRB 1118, 1128–1129 (2006); and North Star Steel Co., 347 NLRB 1364, 1365 (2006). Woldeyes' initial hiring at Respondent was conditioned on his antiunion opinion when hired by

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<sup>&</sup>lt;sup>13</sup> 297 NLRB 816, 818 (1990)

Chenoweth in 2011. Road Supervisor and agent Wolde expressed in conversation with Woldeyes that it would be futile to select the Union. He said that Chenoweth did not want a union, that there would not be an election, and that even if there was, that they would "get nothing." Alonso also expressed these views to another driver, Aleme, by telling Aleme that "the Union is not going to help us" and that the company was better off without the Union and that the Union "did nothing for the other [cab] compan[ies]".

By representing these views to Woldeyes and Aleme, I find that Respondent made unlawful statements that it would be futile for the employees to select the Union as a collective-bargaining representative in violation of Section 8(a)(1) of the Act.

### V. Pino's Threats of Loss of Pay and Statement of Futility

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The General Counsel further alleges in paragraphs 5(d), 5(e), 7, and 9 of the complaint that, on dates between March 24 and April 7 and between April 11 and May 5, Respondent, by Pino, threatened its employees with loss of pay if they selected the Union as their collective-bargaining representative, threatened its employees with unspecified reprisals for engaging in union or concerted activities, and attributed reduction in employee benefits to union or concerted activity as a statement of futility near the drivers' waiting area at Respondent's facility in violation of Section 8(a)(1) of the Act.

Woldeyes spoke with Operations Manager Pino in support of the Union on two occasions. During the first conversation in March of 2013, Pino approached a group of drivers waiting for their shift to start and said, "...those groups from certain countries, they are trying to unionize everywhere, even here. And that's not a good idea." Woldeyes then asked him, "What is the problem if we go union?" Pino replied, "If you go union, you'll get less money. You will—you will then the [your pay] rates go low." Woldeyes responded, "No . . . I'm not asking you as a driver. I'm asking you as a manager what problem [the Union] will bring to your Company []." Pino replied, "You don't get the hour, the shift you like. You don't drive those nice cars." When Woldeyes again tried to clarify that he was asking what would happen to Respondent, rather than the drivers, Pino simply looked at him and left.

About a week later, and 2 weeks prior to the April election, Woldeyes and Pino had a second conversation about the Union. A pamphlet had been sent by the TA about long-hauling not being tolerated. Woldeyes asked Pino, "What is this [pamphlet] all about?" Pointing towards the paper, Pino said, "It's you unionizing that, printing that. It's you. You unionizing guys who go out bring you this to the companies."

Under Section 8(c) of the Act, employers and supervisors may openly express antiunion sentiment without committing an unfair labor practice provided their statements contain no threat of reprisal or force or promise of a benefit. See 29 U.S.C. Sec. 158(c). The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), established that an employer may express its general views about unionism, or specific views about a particular union, so long as the communications do not contain a threat of reprisal or force. The Court explained

further that an employer could even make a prediction as to the effects unionization will have on their company, so long as that prediction is based on objective facts and is in regard to things beyond the present control of the employer.

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In the present case, Pino made his statements that Woldeyes would receive less or lower pay-rates and lesser quality cabs to drive if the Union came in at Respondent. I find that this was an implicit threat, and therefore a violation of Section 8(a)(1) of the Act. The evidence does not show that Pino's statements were based on any reasonably calculated objective facts, and because the statements implicitly carried a threat of reprisal against Woldeyes if he voted for the Union and the Union came in, the statements would reasonably be understood as a threat. See, e.g., *Presidential Riverboat Casinos*, 329 NLRB 77 (1999) (statement that wages might possibly be decreased if the union were elected would reasonably be understood as a threat that employer might retaliate by reducing wages); *Ed Chandler Ford*, 254 NLRB 851, 852, 858 (1981), enfd. in pertinent part 718 F.2d 892 (9th Cir. 1983) (statement that collective bargaining would probably result in loss of bonuses, not based on objective fact, constituted threat of loss of bonuses if union won election).

Additionally, I note *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op at 1 (2010), in which the employer said to an employee "[You] need to be grateful for the number of years that [you] have been working with Metro and for [your] pay rate . . . it could get much worse in the event the Union comes in." The Board found that the statement coercively conveyed to the employee that "he would be jeopardizing his job security and current wage rate by supporting the Union," and was thus an unlawful threat. Similarly, in the case at hand, Pino's statements to Woldeyes that by unionizing Woldeyes will receive less pay, less profitable work shifts, and less desirable cabs to drive are coercive threats of reprisal. In addition, Pino's statement to Woldeyes that by unionizing the TA will retaliate against Respondent and its drivers by enforcing long-hauling rules that Respondent actively skirts without unionizing through its cellphone construction reports, Pino once again has coercively threatened Woldeyes with loss of pay and penalties due to his unionizing activities. I find that these statements are threats as they relate to the pay and futility of Respondent's employees selecting the Union as their bargaining representative, in violation of the Act. They are, therefore, unlawful and a violation of Section 8(a)(1) of the Act.

### VI. Pino's Statements Not Giving the Impression of Surveillance

The General Counsel further alleges in paragraphs 5(e), 7, and 9 of the complaint that, on a date between April 11 and about May 5, Respondent, by Pino, near the drivers' waiting area at Respondent's facility created the impression among its employees that their union and concerted activities were under surveillance by Respondent in violation of Section 8(a)(1) of the Act.

Here, Pino made it clear that he was not vaguely talking about the drivers who took their issues to the state capitol legislature in Carson City, Nevada, but, instead, made it clear that he was addressing Woldeyes. Pino started pointing at Woldeyes while identifying him as "you unionizing guys" and "it's you" and how the unionizing guys were bringing problems. By April 11, Woldeyes had started advocating on behalf of the Union in his native language during the Habesha teleconferences, and had also undertaken such activities with Wolde in March and at Respondent's facility with Pino in March and early April as referenced above.

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The test for determining whether an employer has created an impression that its employees' protected activities have been placed under surveillance is "whether the employees would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance." *Greater Omaha Packing Co., Inc.* 360 NLRB No. 62, slip op. at 3 (2014); *Rood Industries*, 278 NLRB 160, 164 (1986). When an employer tells employees that it is aware of their protected activities, but fails to tell them the source of that information, it violates Section 8(a)(1) "because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude the information was obtained through employer monitoring." Id.

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test is whether under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities. Id. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard. Id.

Here, Pino did not create the impression of surveillance by specifically identifying Woldeyes as the "unionizing guys" at a time when Woldeyes' activities were already open and obvious at Respondent's facility. Woldeyes had already had his conversations with Wolde and Pino in March and early April where Respondent was made aware that Woldeyes had changed his position and was openly organizing at Respondent's facility. As a result, I find that Respondent did not create an impression of surveillance of union or concerted activities in violation of Section 8(a)(1) of the Act as alleged in the complaint.

# VIII. Unlawful Discharge of Fikresilassie Woldeyes

The General Counsel alleges in paragraphs 6(a), 6(b), 8 and 9 of the complaint that, on May 27, Respondent discharged Woldeyes because he formed, joined, or assisted the Union, and to discourage employees from engaging in these activities in violation of Sections 8(a)(1) and (3) of the Act.

The Board employs the test set forth in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in cases involving dual motivation for the termination of an employee. In accordance with *Wright Line*, the General Counsel must initially make a prima facie showing

sufficient to support an inference that protected union activity was a motivating factor in the decision to discharge or take other adverse action against an employee. This means that the General Counsel must prove by a preponderance of evidence that the employee was engaged in protected activity, that the employer knew that the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. Id. at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Rober Orr/Sysco Food Services*, 343 NLRB 1183 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Rober Orr/Sysco Food Services* at 1184:

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To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB No. 94 slip op. at 3 (2003).

When the General Counsel has satisfied this burden, the burden of persuasion then shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the employee's protected activity. If Respondent advances reasons found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

In the present case, the evidence demonstrates that Woldeyes participated in protected union activity, Respondent learned of this activity by March and early April through two different management representatives, Wolde and Pino, that Woldeyes' had changed his sympathies to support unionizing at Respondent, and Respondent terminated Woldeyes because of his protected activities.

Specifically, Woldeyes changed his views and began supporting the Union around March, and started frequently and actively publicizing these views through his participation in the Habesha conferences. Respondent had direct and general knowledge of Woldeye's activities in support of the Union. Not only did Respondent's supervisor and agent Wolde observe and listen to one of the speeches Woldeyes made during a teleconference, Wolde had a conversation with him immediately following the speech. Knowledge can also be inferred by Respondent's admitted assumption that its Ethiopian drivers supported the Union and the fact that Wolde was promoted to Road Supervisor in February 2012, when Respondent received word that some of its Ethiopian employees were attempting to unionize Respondent and Wolde would be elevated to become Respondent's eyes and ears with its Ethiopian employees as Wolde spoke and understood their language. Moreover, Woldeyes and Pino had conversations in March and early April which made it obvious to Pino, as Respondent's chief managing officer, that Woldeyes had become a union organizer and was participating in protected concerted activities.

A violation may be found by an enhancement or increase to discipline in response to union or protected activity. *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1237 (2004). The exercise of discretion to skip steps of discipline in Woldeyes' situation supports a finding of an enhancement in discipline due to Woldeyes' protected activities. Despite Respondent's printed but lax use of progressive discipline and discretion in how to handle absences and doctor notes, Respondent did not issue any final written warning to Woldeyes as it had done previously because of an alleged absence problem, nor did Respondent discuss any alternative lesser shift with him. Rather, after 2 years of high productivity and no discipline for his explained and unexplained absences, Respondent immediately terminated him in May after Woldeyes' continued protected activities in March and April.

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Respondent alleges that Woldeyes' termination was justified for reasons of poor attendance and lying about a single day's absence. However, as described above, there was commonly a wide variety of disciplinary actions aside from discharge taken in response to attendance problems that were afforded to other employees. Further, Respondent has not offered sufficient proof to support its allegation that Woldeyes went to Los Angeles for a day, or showed a supervisor an alleged plane ticket on his phone. I find that Woldeyes actually had a toothache that caused him to call in sick on May 23, that he initially thought was serious enough that it might require professional attention but was later resolved through painkillers from a local drugstore.

Moreover, I do not agree with Respondent's assertion that Proctor, Alonso and Lugo would have had to conspire to terminate Woldeyes or know that the Charging Party had never seen a doctor in order for General Counsel to establish its case. Pino could easily have communicated to his supervisors that Woldeves would be terminated for any additional absence. No conspiring on behalf of the supervisors is necessary. Both Lugo and Alonso testified that Woldeyes was still considered a valuable driver and "high booker" at the time of termination. Respondent's supervisors did not violate the Act in *deciding* to discipline him. Rather, Respondent violated the Act by unlawfully increasing the severity of discipline it applied to Woldeyes: in terminating him, instead of some lesser form of discipline consistent with Respondent's written progressive discipline policy such as a warning or taking the recommendations of Lugo and Alonso to merely take Woldeves off the prime shift and demote him to a regular shift as had been done with other employees. In fact, Respondent supervisors, Alonso and Lugo, expected that Woldeves would be simply demoted, if any discipline at all was to be issued, for Woldeyes' missing work on May 23, without a doctor's note. Supervisor Alonso further testified that there was still value in keeping Woldeyes on one of the other shifts, and that there was no documentation, such as any discipline or warning given to Woldeyes that he was going to lose his shift with any further absences.

Respondent's explanation through Pino for firing Woldeyes does not withstand scrutiny. I have found no probative evidence that Woldeyes' conduct calling in sick on May 23, was any different than it had been on numerous other occasions and was no different than other

high producer drivers at Respondent who call in sick. Some absences are excused with medical documentation and some are unexcused without medical documentation. Unannounced to Woldeyes, Respondent had changed its custom and practice of accepting Woldeyes calling in sick with minimal or no medical documentation due to his protected activities. It is apparent that Pino's claim that he fired Woldeyes for not having a medical documentation for calling in sick and lying about it is mere pretext in view of Respondent's own liberal absences allowed and progressive discipline policy, and Pino's lack of proof that Woldeyes had lied about being sick on May 23, and was in Minnesota or Los Angeles instead. An employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee and its failure to give the employee an opportunity to explain are further indicia of discriminatory intent. See *Hewlett Packard Co.*, 341 NLRB 492 (2004).

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For these reasons, I find that Woldeyes would not have been terminated but for his protected activities. The unexcused absence and Alonso's phony story that Woldeyes told and showed him a plane ticket he could not recall that he was in Los Angeles or Minnesota are a pretext to Woldeves' termination for his protected activity. Respondent's changed behavior in making it more difficult for Woldeyes to request vacation days or holidays off within the month following the time it learned of Woldeves' union activities also supports a finding of pretext and animus related to Woldeyes' protected activities. In consideration of the various factors that have been used as a foundation for inferring animus, I further find that Respondent's deviation from past practice and its disparate treatment of Woldeyes to be significantly more germane. Moreover, as referenced above in Section A. Background, a judge in his or her discretion may rely on factual findings made by another judge in a prior case, even if the case is still pending before the Board on exceptions. Grand Rapids Press of Booth Newspapers, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000). Respondent's recent past history of unlawful conduct as found by Judge Pollack in his December 2012 decision, JD(SF)–57–12, is further evidence of Respondent's antiunion animus and I further take this into account when deciding the present case. Even without Respondent's unlawful conduct in connection with the extended break suspensions, Respondent's animus against the Union is further shown by the independent Section 8(a)(1) violations I have found as described above. Respondent has not shown that it would have terminated Woldeyes in the absence of his union support and protected concerted activities including his advocating his union support on the radio teleconferences to other Ethiopian cab drivers, confronting Pino with prounion statements and questions and generally changing his position from an antiunion to prounion employee at respondent.

Therefore, I find that the discharge of Woldeyes was motivated by his prounion activities in violation of his rights under Section 8(a)(1) and (3) of the Act.

# **CONCLUSIONS OF LAW**

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging Fikresilassie Woldeyes because of his union views, the Respondent violated Section 8(a)(1) and (3) of the Act.
- 4. By coercively interrogating Fikresilassie Woldeyes about his union activities and union sympathies, Respondent violated Section 8(a)(1) of the Act.
- 5. By threatening Fikresilassie Woldeyes with discharge and blacklisting of hire from other companies for his union sympathies, Respondent violated Section 8(a)(1) of the Act.
- 6. By threatening reduced pay and futility of Respondent's employees selecting the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.
- 7. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.
  - 8. The Respondent did not also violate the Act as further alleged in the complaint.

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### REMEDIES

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist such practices and to take certain affirmative action designed to effectuate the policies of the Act.

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Having concluded that the Respondent is responsible for the unlawful discharge of Fikresilassie Woldeyes, the must offer him immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to is seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Woldeyes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the Respondent shall compensate Woldeyes for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. The Respondent shall also be required to expunge from its files any and all references to the discharge, and to notify Woldeyes in writing that this has been done and that the discharge will not be used against him in any way. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended.<sup>14</sup>

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<sup>&</sup>lt;sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

### **ORDER**

The Respondent, Sun Cab Company d/b/a Nellis Cab Co., of Las Vegas, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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- (a) Unlawfully discharging Respondent's employees because of their union views;
- (b) Unlawfully coercively interrogating Respondent's employees about their union activities and union sympathies;

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- (c) Unlawfully threatening Respondent's employees with discharge and blacklisting of hire from other companies for their union sympathies;
- (d) Unlawfully threatening reduced pay and futility of Respondent's employees selecting the Union as their bargaining representative; and
  - (e) Unlawfully in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act.

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- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Within 14 days from the date of this Order, offer Fikresilassie Woldeyes full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Fikresilassie Woldeyes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the Remedy section of this Decision

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(c) Compensate Fikresilassie Woldeyes for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Woldeyes, it will be allocated to the appropriate calendar quarters.

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(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the loss of employment will not be used against him in any way.

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(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this order, post at its facilities in and around Las Vegas, Nevada, copies of the attached notice marked "Appendix" in both English and the Ethiopian language of Amharic. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 17, 2013.

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(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 6, 2014

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Gerald M. Etchingham Administrative Law Judge

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<sup>&</sup>lt;sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### **APPENDIX**

### NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:

**WE WILL NOT** threaten you with discharge, loss of benefits, blacklisting, or unspecified reprisals if you engage in activity with other employees regarding your wages, hours, and working conditions, including participating in Habesha teleconferences to discuss your working terms and conditions of employment or to discuss unionizing.

**WE WILL NOT** ask you about your union or protected concerted activities, including participating in Habesha teleconferences to discuss your working terms and conditions of employment and to discuss unionizing.

**WE WILL NOT** tell you that it would be futile for you to select the Industrial, Technical and Professional Employees Union, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO (Union) as your bargaining representative.

WE WILL NOT attribute a loss of benefits, including pay, to your union or protected concerted activities.

**WE WILL NOT** fire you because of your union membership or support for the Union.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** offer Fikresilassie Woldeyes his job back along with his seniority and all other rights or privileges.

**WE WILL** pay Fikresilassie Woldeyes for the wages and other benefits he lost because we fired him

WE WILL remove from our files all references to the discharge of Fikresilassie Woldeyes and;

WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

Dated:		Sun Cab, Inc. d/b/a Nellis Cab Co
	by:	
		(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want Charging Party representation and it investigates and remedies unfair labor practices by employers and Charging Parties. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

600 Las Vegas Blvd. South, Suite 400 Las Vegas, NV 899101-6637 Hours: 8:15 a.m. to 4:45 p.m. 702-388-6012.

The Administrative Law Judge's decision can be found at <a href="www.nlrb.gov/case/28-CA-106245">www.nlrb.gov/case/28-CA-106245</a> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 702-388-6012.